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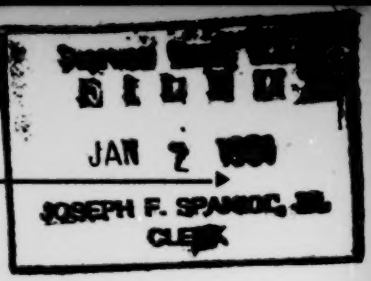

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT AND WIFE, JUNETT BRYANT, INDIVIDUALLY AND AS NEXT FRIENDS OF DAWN D. BRYANT AND KIRT BRYANT,

Petitioners,

v.

WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC., AND WINN-DIXIE, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SECOND COURT OF APPEALS DISTRICT, FORT WORTH, TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in Bryant, et al. v. Winn-Dixie Stores, Inc., et al.[1], that the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d), does not require a seller of ammunition to inquire about disqualifying grounds for the sale of ammunition under the statute conflict with the intent of Congress and with the interpretation of this statute by this Court in Huddleston v. United States, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)?

2. Does the retail sale of ammunition

the sale of ammunition to those who are disqualified by the statute?

LIST OF PARTIES

The parties to the proceeding below are the petitioners, Donald and Junett Bryant and their two children, Dawn D. Bryant and Kirt Bryant.

The respondents are Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc., and Winn-Dixie, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Donald Bryant and wife, Junett Bryant, individually and as next friends of Dawn D. Bryant and Kirt

Bryant, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, entered in the above entitled proceeding on March 21, 1990.

OPINIONS BELOW

The trial court granted respondents' motion for summary judgment without opinion.

The opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas is reported at Bryant, et al. v. Winn-Dixie Stores, Inc., et al., 786 S.W.2d 547 (Tex. App. -- Fort Worth 1990, writ denied) and is reprinted in Appendix A hereto, p. A-1. Rehearing was denied. (See Appendix C hereto, C-1).

The Texas Supreme Court, the court of last resort in the State of Texas, denied review of this decision by refusing to grant petitioners' Application for Writ of Error on September 6, 1990, a copy of that denial is reprinted in Appendix B hereto, p. B-1.

The Texas Supreme Court denied the petitioners' Motion for Rehearing on October 3, 1990 and the denial is reprinted in Appendix C hereto, p. C-1.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). The Court of Appeals of the Second Court of Appeals District, Fort Worth, Texas, rendered its decision on March 21, 1990. The Texas Supreme Court, the highest

court in the State of Texas in which a decision may be had, denied the petitioners' application for writ of error on September 6, 1990. The same court denied petitioners' Motion for Rehearing on October 3, 1990. This petition for certiorari is thus filed within the ninety-day time period permitted by the rules of this Court.

STATUTES INVOLVED

The Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d), which provides in part as follows:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or a licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having

> reasonable cause to believe that such person:
>
> (1) is under indictment for, or has been convicted in any court of, any crime punishable by imprisonment for a term exceeding one year;
>
> (2) is a fugitive from justice;
>
> (3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) has been adjudicated as a mental defective or has been committed to any mental institution.

Id.

The Department of Treasury Regulation, 27 C.F.R. 178.124(a), Firearms Transaction Record which reads in part as follows:

> A licensed importer, licensed manufacturer, or licensed dealer shall not sell or otherwise dispose, temporarily or permanently, of any firearm

> to any person, . . . unless he records the transaction on a firearms transaction record, Form 4473. . . .

Id.

STATEMENT OF THE CASE

Petitioners' son and brother, Rickey Bryant, was brutally murdered, together with four other people, in Lake Worth, Texas, on August 10, 1982. The murderer, Larry Keith Robison, is currently on death row awaiting execution in the Texas Department of Corrections for one of these murders. Prior to the murder of Rickey Bryant, Larry Keith Robison was a convicted felon. Approximately ten days before the murder of Rickey Bryant, Robison purchased a "Saturday Night Special" .22 caliber handgun from a pawn shop in Fort Worth, Texas. Either the

day prior to the murder or the day of the murder, the exact date being in question, Robison purchased ammunition from the respondents through their retail store known as Buddy's Handyman Center located in Fort Worth, Texas. The clerk who sold the ammunition to Larry Keith Robison had received no formal training or instructions by his employer concerning the sale of ammunition other than to verify that a purchaser was over twenty-one years of age by checking his driver's license, and not to sell ammunition to someone who was intoxicated. Mr. Schwabauer, the clerk, candidly admits in his deposition that he knew of no other disqualification and made no other inquiry:

Questions by petitioners' attorney revealed the following about the store's procedures:

QUESTION: (by petitioners' attorney) Let me ask you a kind of, I guess, a general question, but as you understood it or were instructed in it, what--what requirements were there of selling ammunition? You've already stated that the person had to be over 21 years of age.

ANSWER: (by John Schwabauer, respondents' employee) Right.

QUESTION:Were there any other requirements, anything that disqualified people or --

ANSWER: Well, no -- Well, there is if you noticed that he was intoxicated, the individual was intoxicated, why, you would refuse them purchasing the ammunition.

QUESTION: Anything else that

would disqualify a purchaser?

ANSWER: None that I knew of.

. . .

(T.163-166)

QUESTION: Did you ever refuse a sale because of the person appearing to be intoxicated?

ANSWER: Never had that occasion, no, sir.

QUESTION: Did you ever refuse a sale of ammunition because a person appeared to be on drugs or on marijuana?

ANSWER: Wouldn't know if he wasn't or if he was.

QUESTION: Did you ever refuse a sale of ammunition because of the mental condition or appearance of the person attempting to purchase?

ANSWER: Had no way of knowing.

QUESTION: So your answer is no, you never refused?

ANSWER: That's correct.

QUESTION: Did you ever refuse a sale of ammunition based upon criminal record or criminal conviction, criminal history of a purchaser?

ANSWER: Have no way of knowing.

QUESTION: So you never refused -

ANSWER: Never refused, no.

QUESTION: Did you ever have occasion to check a criminal record or criminal history of someone?

ANSWER: No, sir.

QUESTION: Had you received any

particular instructions with respect to criminal record or --

ANSWER: No, sir.

QUESTION: -- convicted felon?

ANSWER: No, sir.
(T.168-169)

The trial court granted, without opinion, respondents' motion for summary judgment, thus finding, as a matter of law, no obligation to inquire of disqualifying factors under the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d). The petitioners timely appealed this holding. See Appendix E attached hereto, p. E-1.

The court acknowledged that the regulation of firearm sales is mandated

by the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) at issue here, and that a violation of the statute may form the basis for civil liability under Texas common law. The facts are undisputed that the respondent sold ammunition to the murderer, who, at the time of the sale, had been convicted of a crime punishable by imprisonment for a term in excess of one year. The court found that an interpretation of the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) was necessary in order to determine the extent of the duty under Texas Common Law:

> A violation under this statute requires the seller to know or have reasonable cause to believe that the person to whom

> he is about to sell a firearm or ammunition fits into one of the four categories specifically set out by the Act. It is here that this court and appellants disagree. There is nothing in this statute which indicates a duty of inquiry on the part of the seller. See 18 U.S.C.A. 921 et seq.

786 S.W.2d at 549.

The Court of Appeals, citing the federal statute, overruled the petitioners' claims that the duty of ordinary care in connection with the sale of ammunition carries with it a duty of inquiry under the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968).

The Court of Appeals held:

> In light of the statute, upon which appellants rely, which indicates to the contrary and in light of the fact appellants bring us no authority directly on point, we are disinclined to make such a ruling. See 18 U.S.C.A 921 et seq. (1976 and

Supp. 1989).

786 S.W.2d at 548.

The court specifically found that "we find that viewing the evidence in the light most favorable to the appellants, there is no genuine issue of material fact as to the violation of the Federal Firearms Control Act, absent a duty to inquire which we do not find." 786 S.W.2d at 550.

Both in the Court of Appeals and in review sought by writ of error before the Texas Supreme Court, the petitioners raised as points of error this erroneous interpretation of the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d). See petitioners' points of error contained in their brief before the Court of Appeals (the applicable

points of error are set out in Appendix E, p. E-1). Petitioners reurged these points of error in their application for writ of error before the Texas Supreme Court which denied the writ. The points of error raised in the petitioners' Application for Writ of Error pertaining to this ground of error before the Texas Supreme Court are set out in Appendix F, p. F-1. The petitioners now ask this Court to grant this writ to review this interpretation of federal law upon which their common law action turns.

REASONS FOR GRANTING THE WRIT

1.

Respondents believe that this holding by the Texas Court of Appeals is contrary to the Congressional intent of the Federal Firearms Control Act (the

Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) as interpreted by this Court in Huddleston v. United States, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974). In Huddleston, this Court held that Congressional action was prompted by widespread trafficking in firearms which was contrary to the public interest. This Court held:

> Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States. S. Rep. No. 1097, 90th Cong, 2d Sess, 108 (1968). The principal purpose of the Federal Gun Control Legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong, 2d Sess, 22 (1968).

415 U.S. at 824.

This Court further held that the principal agent of "federal enforcement is the dealer." 415 U.S. at 824.

To allow the decision of the Texas Court of Appeals to stand would be to diminish the role of the dealer in enforcing the statute, a role that this Court held was central to the Congressional scheme for keeping firearms out of the hands of those whose backgrounds indicate that they are likely to misuse them. The Court of Appeals permits dealers to look the other way in firearms transactions and make absolutely no inquiry to insure that the statute is complied with it, particularly in the case of the sale of ammunition where no written disclosure exists as it does in the sale of firearms. The Court of Appeals' holding that the lack of a written disclosure to the

disqualification questions under the statute in the sale of ammunition indicates that Congress intended less stringent enforcement is also contrary to the Act and to this Court's decision in Huddleston. While Congress may have concluded that the paperwork required in the sale of ammunition might well have outweighed the usefulness of the information received, that implication in no way lessens the burden on the dealer to ascertain compliance with the statute. To allow this interpretation of the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) to stand would be to place dealers in Texas on notice so that they may play the role of an ostrich when it comes to disqualifications under the Act. A seller is unlikely to come by any

information sufficient to place him on notice that the potential purchaser is disqualified without inquiry. Such action will only diminish rather than strengthen the enforcement of gun laws at a time when murder rates in this state, as well as across the nation, are skyrocketing. Persons who should not be in control of firearms or ammunition are increasingly finding that lax enforcement of these laws has made it relatively easy for them to obtain the weapons and firepower they need. Congressional intent in placing criminal penalties on the illegal sale of ammunition certainly implied no interpretation of the duty of a licensed seller as is determined by the Texas Court of Appeals. This Court has held that a probated sentence expunged by state procedures still disqualifies one from owning a firearm or ammunition.

Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).

Inquiry by sellers is paramount to enforcement of this Act. The Court of Appeals substitutes "willful blindness" to disqualification under the Act for "dealer enforcement" held by this Court to be the principal mechanism of enforcement. Such was not the intent of Congress or this Court's teaching in Huddleston.

2.

The Texas Court of Appeals' decision is a decision of a court of last resort when writ of error is denied by the Texas Supreme Court and as such, that decision conflicts with the decisions of other state courts of last resort and of the United States Courts of Appeals such that this Court should resolve the conflict.

There is no question that a federal statute will form the basis of state court tort liability. Texas has long hewed to such a standard by numerous decisions under Texas common law. Love v. Zales Corp., Inc., 689 S.W.2d 282 (Tex. App. -- Eastland 1985, writ ref'd n.r.e.); Howsley v. Gilliam, 517 S.W.2d 531 (Tex. 1975); Gottschalk v. Rudes, 315 S.W.2d 651 (Tex. App. -- San Antonio 1958), aff'd, 324 S.W.2d 201 (Tex. 1959). Texas law recognizes two distinct sources of legal duty, one arising from statute, the other a general duty of ordinary care recognized as common law. El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987). The unexcused violation of a statute which sets an applicable standard of care constitutes negligence per se if the statute is designed to prevent an injury to that class of persons to which the

injured person belongs. Hayes v. United States, 899 F.2d 438 (5th Cir. 1990); El Chico Corp. v. Poole. The federal courts have likewise recognized that a federal statute may also form the basis for state tort liability. In re Bendectin Litigation, 857 F.2d 290 (6th Cir. 1988); Pratico v. Portland Terminal Co., 783 F.2d 255 (1st Cir. 1985); Dixon v. International Harvester Co., 754 F.2d 573 (5th Cir. 1985); Lowe v. General Motors Corp., 624 F.2d 1373 (5th Cir. 1980).

The Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. §§ 921, et seq., has been found to be the basis of state tort liability for negligence by numerous state courts. Decker v. Gibson Prods. Co. of Albany, Inc., 679 F.2d 2120 (11th Cir. 1982)

(section 922(d) duty of inquiry forms standard for common law negligence); Hetherton v. Sears, Roebuck & Co., 593 F.2d 526 (3rd Cir. 1979); Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977) (Arkansas Supreme Court recognized the duty under section 922 (d)); Cullum and Boren-McCain Mall, Inc. v. Peacock, 592 S.W.2d 442 (Ark. 1980) (duty of inquiry under section 922(d)); K-Mart Enterprises of Florida, Inc. v. Keller, 439 So. 2d 283 (Fla. Dist. Ct. App. 1983) (store liable when clerk failed to inquire under section 922(d)); Phillips v. Roy, 431 So. 2d 849 (La. Ct. App. 1983); Howard Bros. of Phenix City, Inc. v. Penley, 492 So. 2d 965 (Miss. 1986); Love v. Zales Corp., Inc., 689 S.W.2d 282 (Tex. App. -- Eastland 1985, writ ref'd n.r.e.).

Whether the statute itself creates

a cause of action or merely acts as a standard against which to measure a defendant's conduct for purposes of determining common law tort liability makes no difference. Decker v. Gibson Prods. Co. of Albany, Inc.; and Lowe v. General Motors Corp. In either case where a state in some way uses a federal statutory violation as a basis for state tort liability, either as a standard or as a basis for negligence per se, it is the intent of Congress and not merely the intent of the state that governs the interpretation of the statute. In re Bendectin Litigation, 857 F.2d at 314; and W. Prosser & R. Keeton, The Law of Torts § 36 (5th ed. 1984). The interpretation of the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) here is

not only at odds with this Court's decision in Huddleston and the Congressional intent of the statute, but with the decisions of virtually every state court of last resort that has considered the matter. The Court of Appeals of Louisiana in Phillips, the Supreme Court of Mississippi in Howard Bros., the Supreme Court of Arkansas in Franco, and Peacock, the Court of Appeals of Florida in Keller, and the decision of the Court of Appeals for the Eleventh Circuit in Decker, all hold that the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) requires a gun seller to make some inquiry into potential disqualification factors in the sale of firearms and none makes any exception for the sale of ammunition which carries the

same standard (§ 922(d)).

This Court has held that the act should be broadly construed. Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983). The federal appellate courts have long construed the term "reasonable cause to believe" to be an indication of a less severe burden to be placed on the government in proving subjective intent under the statute. United States v. Kraase, 484 F.2d 549 (7th Cir. 1973). Furthermore, the federal courts have held that the scienter requirement of the statute can be met when there is "reckless disregard" as to the truth of statements to which one subscribes. United States v. Kozerski, 518 F.Supp. 1082 (D.N.H. 1981) (quoting United States v. Wright, 537 F.2d 1144 (1st Cir. 1976)). Furthermore, the failure to

supervise the sale of guns under the Act has been held to violate the scienter requirement of the Act and corporate liability imposed by imputation to the corporation of the action of supervisory employees. United States v. Gibson Prods. Co., Inc., 426 F.Supp. 768 (S.D. Tex. 1976). This Court has found that expungement of a criminal proceeding under state procedures does not suffice to avoid disability under the Act for offenses punishable by imprisonment for more than one year. Dickerson v. New Banner Institute. The common jury instruction rendered in federal cases for violation of this and other acts involving the scienter requirement of "know or should have known" reads in part as follows:

> . . . no person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to

investigate. . . .

See United States v. Gabriel, 597 F.2d 95, 100 (7th Cir. 1979); United States v. Grizaffi, 471 F.2d 69 (7th Cir.), cert. denied, 411 U.S. 964 (1972); see also, United States v. Dozier, 522 F.2d 224 (2d Cir.), cert. denied, 423 U.S. 1021 (1975); United States v. Mayo, 498 F.2d 713 (D.C. Cir. 1974); United States v. Thomas, 484 F.2d 909 (6th Cir.), cert. denied, 415 U.S. 924 (1973).

The Court of Appeals' decision at bar creates a different standard of "knowingly" than the one determined by the federal courts of appeal to apply in cases in interpreting the Act. United States v. Thomas, 484 F.2d 909 (6th Cir.), cert. denied, 415 U.S. 924 (1973).

Thus, the Texas Court of Appeals' holding is contrary to other state courts of last resort that have considered the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968) either as a statute creating an

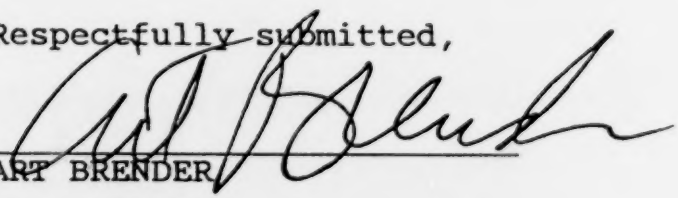
independent cause of action or as establishing a standard against which common law negligence is to be judged. Each state court requires that inquiry be made of persons purchasing firearms as well as ammunition. The Court of Appeals' decision is contrary to the federal courts of appeal that have routinely held that gun sellers cannot close their eyes to the disqualifications of the statute even in criminal prosecutions. The Court of Appeals' decision is contrary to this Court's holdings interpreting the statute at issue and creates a new standard for gun dealers, that of "willful blindness" to the requirements of the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968). The new standard set by the Court of Appeals can

neither be justified nor tolerated, particularly in the current climate of violence and lawlessness carried out oftentimes with weapons procured in violation of this statute.

CONCLUSION

WHEREFORE, the petitioners pray that the Court grant this petition for writ of certiorari.

Respectfully submitted,



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APPENDIX A

Donald BRYANT and Wife, Junett Bryant, Individually and as Next Friends of Dawn D. Bryant and Kirt Bryant, Appellants,

v.

WINN-DIXIE STORES, INC., Winn-Dixie Handyman, Inc., and Winn-Dixie, Inc., Appellees.

NO. 2-88-269-CV

Court of Appeals of Texas, Fort Worth.

March 21, 1990.
Rehearing denied April 18, 1990.

Action for negligence and negligence per se was brought against sellers of ammunition used in four murders. The 17th District Court, Tarrant County, Charles J. Murray, J., granted summary judgment for defendants. On appeal, the Court of Appeals, Lattimore, J., held that: (1) under Federal Firearms Control Act, seller's duty of ordinary care in

connection with sale of ammunition did not carry with it a duty of inquiry, and (2) seller did not breach its duty of care in connection with sale in question.

Affirmed.

OPINION

LATTIMORE, Justice.

Appellants bring this appeal from the trial court's grant of appellees' motion for summary judgment.

We affirm.

Appellants' son/brother, together with four other people, was murdered with a .22 caliber pistol. The ammunition used in the murders was allegedly purchased from appellees.

Appellants brought their cause of action against appellees for negligence and negligence per se in connection with the sale of the ammunition.

In appellants' first, second, and

third points of error they contend that the trial court erred in granting appellees' motion for summary judgment. Appellants contend that the trial court held as a matter of law that no duty exists on the part of a seller of ammunition to use ordinary care to avoid selling ammunition to a convicted felon or a person who is mentally unstable. Further, it was error by the trial court to hold there was no genuine issue of material fact as to appellees' alleged violation of the Federal Firearms Control Act. Additionally, the court erred in finding there was no evidence as a matter of law tending to raise the issue whether appellees or their agents and employees knew or had reasonable cause to believe that the assailant to whom the ammunition was sold was a convicted felon or was mentally unstable on the occasion in

question.

The law in Texas is well settled, that summary judgment is a harsh remedy and must be strictly construed. International Ins. Co. v. Herman G. West, Inc., 649 S.W.2d 824 (Tex. App. -- Fort Worth 1983, no writ). In a summary judgment case, the question on appeal, as well as in the trial court, is not whether the summary judgment proof raises a fact issue with reference to the essential elements of the cause of action but whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of a plaintiff's cause of action; burden of proof is on the movant, all doubts as to existence of a genuine issue of material fact are resolved against the movant, all conflicts in the evidence are

disregarded, and the evidence which tends to support the position of the party opposing the motion is accepted as true. Nixon v. Mr. Property Mgt. Corp., 690 S.W.2d 546, 547-48 (Tex. 1985); Aldridge v. Young, 689 S.W.2d 342 (Tex. App. -- Fort Worth 1985, no writ); TEX. R. CIV. P. 166a.

We must review the record in the light most favorable to appellants. Gaines v. Hamman, 163 Tex. 618, 358 S.W.2d 557, 562 (1962). Appellants' argument is depended upon a finding of a duty of inquiry. If we do not find a duty of inquiry on the part of appellees, appellants cannot prevail.

[1] Appellants' first point of error complains that the trial court ruled, as a matter of law, that a seller of ammunition has no duty of ordinary care to avoid selling ammunition to a

convicted felon or a person who is mentally unstable. We disagree. Appellants would have this court rule, as a matter of law, that a duty of ordinary care in connection with the sale of ammunition carries with it a duty of inquiry. In light of the statute, upon which appellants rely, which indicates to the contrary and in light of the fact appellants bring us no authority directly on point, we are disinclined to make such a ruling. See 18 U.S.C.A. 921 et seq. (1976 and Supp. 1989).

The regulation of ammunition sales is mandated by federal statute. Any negligence per se, on part of appellees, would arise pursuant to the Omnibus Crime Act of 1968. 18 U.S.C.A. § 921 et seq. ("Federal Firearms Control Act"; "Act"). Appellants draw our attention to § 922(d) in support of their negligence per se

contention. This portion of the Act provides:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or a licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person:
>
> (1) is under indictment for, or has been convicted in any court of, any crime punishable by imprisonment for a term exceeding one year;
>
> (2) is a fugitive from justice;
>
> (3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) has been adjudicated as a mental defective or has been committed to any mental institution.

Id.

It is undisputed that the assailant

in question, to whom appellees sold the ammunition, had been convicted of a crime punishable by imprisonment for a term exceeding one year. It is equally undisputed that appellees sold ammunition to the assailant. However, a fair reading of this statute does not indicate that it gives rise to strict liability. See 18 U.S.C.A. 921 et seq. A violation under this statute requires the seller to know or have reasonable cause to believe that the person to whom he is about to sell a firearm or ammunition fits into one of the four categories specifically set out by the Act. It is here that this court and appellants disagree. There is nothing in this statute which indicates a duty of inquiry on the part of the seller. See 18 U.S.C.A. 921 et seq. The only evidence presented to the trial court at the summary judgment hearing

with regard to what appellees' employee knew or had reasonable cause to believe came from the affidavit of the clerk who sold the ammunition and also this clerk's deposition testimony.

The affidavit and deposition of the store clerk indicate that he recalls selling the ammunition to the assailant. He testified that the assailant did not appear unusual or remarkable in any way. We think it is reasonable that the trial court made no finding that the duty of ordinary care did not exist, rather they found there was no breach of the duty of ordinary care.

Appellants bring to us a profusion of authority from which they attempt to concatenate some duty of inquiry to bolster their cause. This plentitude of authority includes Love v. Zales Corp., 689 S.W.2d 282 (Tex. Civ. App. --

Eastland 1985, writ ref'd n.r.e.) (clerk was "clearly negligent" in selling a shotgun to a person who disclosed that he had previously been committed to a mental institution); Phillips v. Roy, 431 So. 2d 849 (La. App. 2nd Cir. 1983) (salesperson has a duty, over and above filling out the application to purchase a firearm to observe the customer, watching carefully for any signs of mental disturbance or instability which would tend to alert the average individual to the possibility of problems in the area which would require some further inquiry); Franco v. Bunyard, 261 Ark. 144, 547 S.W.2d 91 (1977); Cullum & Boren-McCain Mall, Inc. v. Peacock, 267 Ark. 479, 592 S.W.2d 442 (1980) (violation of § 922 of the Omnibus Crime Act did create a duty which is actionable at common law); K-Mart Enter. v. Keller, 439 So. 2d 283 (Fla. Dist. Ct.

App. 1983) (retail clerk failed to inquire of the purchaser of a weapon facts which are required to be filed on form 4473 [firearm transaction record] the clerk simply filled in the answers himself).

These cases are distinguishable. Each and every case appellants cite deals not with the sale of ammunition, but with the sale of a weapon. It is uncontroverted that the sale of a firearm is more closely regulated than the sale of ammunition. A dealer of firearms may not sell any firearms to a person unless he records the transaction on a firearms transaction records, form 4473. 27 C.F.R. § 178.124(a) (1982).

Form 4473 mandates the recording of the name, address, date, place of birth, height, weight, and race of the purchaser and it includes an executed certification

by the purchaser that he is not prohibited from receiving a firearm, to wit: he is not a convicted felon, a fugitive from justice, a drug user, or has not been adjudicated a mental defective or committed to a mental institution. 27 C.F.R. § 178.124(c) (1982). There is no such requirement for a seller of ammunition. Rather, the statute as it existed on the date of the alleged negligence mandated the ministerial recording of some basic information. The information required of the purchaser included his name, address, date of birth, and the identification of the method used to verify the above information. Other information included the name of the manufacturer of the ammunition, the caliber or gauge, the quantity, and the date of the transaction. 47 C.F.R. § 178.125(c)

(1982). We find no statutory or regulatory duty of any kind to further investigate a purchaser's background, nor any authority to indicate the existence of such a duty. Rather, appellants bring us authority which would indicate to the contrary. Appellants cite Decker v. Gibson Prod. Co., 679 F.2d 212 (11th Cir. 1982). There the federal court explored the question of an independent duty created by 18 U.S.C.A. § 922, and did not find one. They held that this section created a standard against which to measure a person's conduct for the purposes of determining negligence. Decker, 679 F.2d at 214.

Appellants' use of this case to create a new duty under the law or perhaps to generate a fact issue which would preclude summary judgment is not supported by logic or the record.

[2] We hold, in view of the summary judgment evidence, taken in the light most favorable to appellants, it is unreasonable for appellants to suggest that the trial court held, as a matter of law, that no duty exists on the part of the seller of ammunition to use ordinary care. We think the record more reasonably indicates the court found a duty, and found that the duty had not been violated. Further, we find that viewing the evidence in the light most favorable to appellants, there is no genuine issue of material fact as to the violation of the Federal Firearms Control Act, absent a duty to inquire which we do not find. Additionally, in light of the evidence upon which the trial court based its ruling, we find there was no evidence, as a matter of law, which would raise a fact issue with regard to

appellees, their agents, and employees knowing or having reasonable cause to believe the assailant fell within one of the four categories set out in 18 U.S.C.A. § 922(d).

Appellants' first, second, and third points of error are overruled.

In order to support their summary judgment it was necessary for defendants [here appellees] to negate only one of the elements of plaintiff's cause of action. Aldridge, 689 S.W.2d at 342. By upholding the trial court's ruling as to duty and breach of duty it is unnecessary for us to discuss appellant's forth point of error concerning proximate cause.

The judgment of the trial court is affirmed.

Court of Appeals
Second Court of Appeals District of Texas
The Courthouse
Fort Worth, Texas 76196
Yvonne Palmer, Clerk
817/334-1400

March 21, 1990

(Address omitted)

(Address omitted)

RE: CASE NO. 02-88-00269-CV

STYLE: Bryant, Donald and Junett Bryant, Ind. et al. V: Winn-Dixie Stores, Inc., Winn-Dixie Handyman, et al.

The judgment of the trial court in the above case was affirmed today.

Copies of the opinion and judgment of this Court are attached hereto.

Respectfully yours,

YVONNE PALMER, CLERK

By _____
Deputy

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 6, 1990

(Address omitted) (Address omitted)

(Address omitted) (Address omitted)

RE: Case No. C-9911

Style: DONALD BRYANT and WIFE, JUNETT BRYANT, ET AL. v WINN-DIXIE STORES, INC., ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, Writ Denied.

Sincerely,

JOHN T. ADAMS, CLERK

by _____
Courtland Crocker, Deputy

APPENDIX C

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

Donald Bryant, et al.)

vs.) No. 2-88-269-CV

Winn-Dixie Stores, Inc.)
et al.

ORDER

On this day came on to be considered, appellants motion for rehearing and appellees' response.

It is the opinion of this Court that said motion is and hereby **overruled.** It is the order of this Court that the opinion and judgment of March 21, 1990, stand unchanged.

The Clerk of this Court is directed to transmit of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 18th day of April, 1990.

_____

HAL M. LATTIMORE
JUSTICE

APPENDIX D

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 3, 1990

(Address omitted) (Address omitted)

(Address omitted) (Address omitted)

RE: Case No. C-9911

Style: DONALD BRYANT and WIFE, JUNETT BRYANT, ET AL. v WINN-DIXIE STORES, INC., ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled cause.

Sincerely,

JOHN T. ADAMS, CLERK

by _____
Courtland Crocker, Deputy

APPENDIX E

STATEMENT OF THE POINTS OF ERROR
(APPELLANTS' BRIEF - COURT OF APPEALS, SECOND COURT OF APPEALS, FORT WORTH, TEXAS)

POINT OF ERROR NUMBER ONE

The District Court erred in granting the Defendants' Motion For Summary Judgment and thereby holding that, as a matter of law, no duty exists on the part of a seller of ammunition to use ordinary care to avoid selling ammunition to a convicted felon or a person who is mentally unstable.

POINT OF ERROR NUMBER TWO

The District Court erred in granting the Defendants' Motion For Summary Judgment by finding, as a matter of law, that there was no genuine issue of material fact as to the violation of the Federal Firearms Control Act, (Omnibus Crime Control Act of 1968), 18 U.S.C., sec. 921, et seq., and in particular, sec. 922(d) in the sale of the .22 calibre ammunition to Larry Keith Robison on the occasion in question.

POINT OF ERROR NUMBER THREE

The District Court erred in granting the Defendants' Motion For Summary Judgment by finding that there was no evidence, as a matter of law, that raised the issue of whether or not the Defendants, acting through their agents and employees,

either knew or had reasonable cause to believe that Larry Keith Robison was a convicted felon, an unlawful user of marijuana and depressant and/or stimulative drugs and/or was mentally unstable on the occasion in question.

APPENDIX F

STATEMENT OF THE POINTS OF ERROR (APPELLANTS' APPLICATION FOR WRIT OF ERROR - THE SUPREME COURT OF TEXAS)

POINT OF ERROR NUMBER ONE

The Court of Appeals erred in affirming the District Court's decision to grant summary judgment because the summary judgment evidence presented by the Defendants was not legally sufficient to show and failed to show that there was no genuine issue of material fact and failed to show that Defendants were entitled to judgment as a matter of law on the cause of action pled by the Plaintiffs. (T.51-61, 199, 161-175)

POINT OF ERROR NUMBER TWO

The Court of Appeals erred in granting the District Court's decision to grant summary judgment by finding as a matter of law that there was no genuine issue of material fact as to the violation of the Federal Firearms Control Act, (Omnibus Crime Control Act of 1968), 18 U.S.C. § 921, et seq., and in particular, § 922(d), in the sale of the .22 calibre ammunition to Larry Keith Robison on the occasion in question. (T.51-61, 199, 161-175)

POINT OF ERROR NUMBER THREE

The Court of Appeals erred in affirming the District Court's decision to grant summary judgment by finding that there

was no evidence, as a matter of law, that raised the issue of whether or not the Defendants, acting through their agents and employees, either knew or had reasonable cause to believe that Larry Keith Robison was a convicted felon, an unlawful user of marijuana and depressant and/or stimulative drugs and/or was mentally unstable on the occasion in question. (T.51-61, 199, 161-175)

POINT OF ERROR NUMBER FOUR

The Court of Appeals erred in affirming the District Court's decision to grant summary judgment by finding, as a matter of law, that there was no common law, statutory, or regulatory duty of any kind to require that the seller of ammunition inquire as to whether or not the purchaser is ineligible to purchase ammunition under 18 U.S.C. § 921, et seq. (T.51-61, 199, 161-175)

POINT OF ERROR NUMBER FIVE

The Court of Appeals erred in affirming the District Court's decision to grant summary judgment by interpreting the Federal Firearms Control Act, (Omnibus Crime Control Act of 1968), 18 U.S.C. § 921, et seq., and in particular, § 922(d), to permit the sale of ammunition to any person without inquiry as to whether or not the purchaser would be prohibited by that statute from the purchase of ammunition and in doing so, violated the right of the Plaintiffs to due process of law is guaranteed by art. I, § 19 of the Texas Constitution and by

the Fifth and Fourteenth Amendments to the United States Constitution. (T.51-61, 199, 161-175)

POINT OF ERROR NUMBER SIX

The Court of Appeals erred in affirming the District Court's decision to grant summary judgment by finding as a matter of law that no inquiry to the disqualifying factors for the purchase of ammunition under 18 U.S.C. § 921, et seq. in that the question of inquiry is the question of fact to be determined under the facts and circumstances of each individual case and the Plaintiffs, by virtue of the proof presented and the testimony of the store clerk, raised a genuine issue of fact as to whether or not inquiry should have been made on the occasion in question. (T.51-61, 199, 161-175)

(2)

No. 90-1089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT and Wife, JUNETT BRYANT,
Individually and as Next Friends of
DAWN D. BRYANT and KIRT BRYANT, *Petitioners*

v.

WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
and WINN-DIXIE TEXAS, INC., *Respondents*

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS,
SECOND COURT OF APPEALS DISTRICT,
FORT WORTH, TEXAS

Brief in Opposition to Petition for Writ of Certiorari

SLOAN B. BLAIR*
TOLBERT L. GREENWOOD
MARY COLCHIN JOHNDROE

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**Counsel of Record for Respondents*

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

I. RESPONSE TO QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in *Bryant, et al. v. Winn-Dixie Stores, Inc., et al.*, 786 S.W.2d 547 (Tex. App.–Fort Worth 1990, writ denied) conflict with the intent of Congress or with the interpretation of 18 U.S.C. § 922(a)(6) by this Court in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)?

2. Petitioners' second question presented is nonsensical, apparently with critical language omitted and, therefore, cannot be responded to.

II. LIST OF ALL PARTIES

The following are parties to this case:

Donald Bryant and Wife, Junett Bryant, Individually, and as Next Friends of Dawn Dee Bryant and Kirt Bryant ("BRYANTS")

Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc., and Winn-Dixie Texas, Inc. ("WINN-DIXIE")

III. TABLE OF CONTENTS

IV. TABLE OF AUTHORITIES

IV. TABLE OF AUTHORITIES (Continued)

V. OPINIONS AND ORDERS BELOW

BRYANTS affixed reprinted versions of the Opinion of the Court of Appeals for the Second Supreme Judicial District, Fort Worth, Texas, *Bryant, et al. v. Winn-Dixie Stores, Inc., et al.*, 786 S.W.2d 547 (Tex. App. – Fort Worth 1990, writ denied), denial of review by the Supreme Court of Texas and denial of BRYANTS' motion for rehearing of the application for writ of error (*See*, Petition for Writ of Certiorari, Appendices A, B and C).

However, BRYANTS represented to this Court that the trial court granted WINN-DIXIE's Motions for Summary Judgment without opinion. This is not wholly accurate as the 17th District Court of Tarrant County, Texas rendered a written Order Granting Motions for Summary Judgment and Amended Motions for Summary Judgment and Severance of Defendants Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc. and Winn-Dixie Texas, Inc. ("Order Granting Motions for Summary Judgment") in favor of WINN-DIXIE in Cause No. 17-117421-88 on December 8, 1988. A copy of the Order Granting Motions for Summary Judgment is reprinted at Appendix "A" hereto, p. A-1.

VI. OBJECTIONS TO JURISDICTION

1. No Ground Under 28 U.S.C. § 1257(a)

BRYANTS seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a) by merely referencing the citation to this statute. BRYANTS do not elaborate as to which ground under 28 U.S.C. § 1257(a) might be applicable to this case. Perhaps because none is.

There is no treaty or statute of the United States, or statute of any state, the validity of which has been drawn in question. There has been no Constitutional challenge. Further, there is no claim to any title, right, privilege, or immunity under the Constitution, treaties or statutes of the United States. Rather, BRYANTS have attempted to assert a Texas state

common law cause of action, sounding in negligence *per se*, with the applicable standard of care determined by a federal statute, i.e., 18 U.S.C. § 922(d). Thus, any right claimed herein arises from Texas state common law.

2. BRYANTS Seek an Advisory Opinion

As BRYANTS are seemingly well aware, their request that this Court review the interpretations of the Courts below of 18 U.S.C. § 922(d) is a request that this Court render an advisory opinion. In this connection, regardless of this Court's interpretation of 18 U.S.C. § 922(d), and even if this Court, by its construction, found a duty which WINN-DIXIE breached, the summary judgment rendered by the 17th District Court of Tarrant County, Texas, would still stand in favor of WINN-DIXIE.

The Order Granting Motions for Summary Judgment expressly granted these motions upon each and every ground stated in the motions. [TR. pp. 246-247]. These grounds included that, as a matter of law, WINN-DIXIE was not negligent in the sale of ammunition to Larry Keith Robison ("Robison") and that the sole cause of the death of Rickey Lee Bryant was the intervening criminal acts or omissions of another. [TR. pp. 51-64]. BRYANTS acknowledged the holding of the 17th District Court in WINN-DIXIE's favor on the element of proximate cause by BRYANTS' Point of Error IV in their Brief for Appellants, submitted to the Court of Appeals in Cause No. 02-88-269-CV. Although BRYANTS purport to give this Court a Statement of the Points of Error from BRYANTS' Brief in the Court of Appeals at Appendix E to BRYANTS' Petition for Writ of Certiorari, BRYANTS failed to include their Point of Error IV in this Statement, which is as follows:

> THE DISTRICT COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BY FINDING, AS A MATTER OF LAW, THAT THE ACT OF MURDER, BY LARRY KEITH

ROBISON, WAS THE SOLE PROXIMATE CAUSE OF RICKEY LEE BRYANT'S DEATH WHICH THUS BROKE THE CAUSAL CONNECTION OF THE SALE OF AMMUNITION TO A CONVICTED FELON.

The Court of Appeals, having upheld the 17th District Court's ruling as to duty and breach of duty, found it unnecessary to discuss BRYANTS' Point of Error IV concerning proximate cause. (*See*, Petition for Writ of Certiorari, Appendix A, p. A-15.) BRYANTS did not re-urge their Point of Error IV before the Court of Appeals. Likewise, BRYANTS did not request any point before the Supreme Court of Texas on the sole proximate cause finding of the 17th District Court.

Contrarily, WINN-DIXIE did preserve and urge this point before the Supreme Court of Texas in WINN-DIXIE's Cross-Point One, which states:

THE DISTRICT COURT CORRECTLY GRANTED WINN-DIXIE'S MOTION AND AMENDED MOTIONS FOR SUMMARY JUDGMENT BY FINDING, AS A MATTER OF LAW, THAT THE SOLE CAUSE OF THE DEATH OF RICKEY LEE BRYANT WAS THE INTERVENING ACTS OR OMISSIONS OF SOMEONE OR SOMETHING OTHER THAN WINN-DIXIE.

A finding of negligence *per se* would only determine the elements of duty and breach. It would not establish liability because, in addition, for any liability to attach, such negligence must be a proximate cause of the injury or damages. *Missouri Pacific Railroad Company v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). Accordingly, even if this Court were to determine that WINN-DIXIE was negligent *per se* in the sale of ammunition to Robison, the final summary judgment of the 17th District Court as to sole proximate cause would necessitate that judgment in favor of WINN-DIXIE still stand.

The United States Supreme Court's power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights; the power is to correct wrong judgments, not to revise opinions, and the Court is not permitted to render an advisory opinion. *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566, 97 S.Ct. 2849, 53 L.Ed.2d 965, 970 (1977); *Fay v. Noia*, 372 U.S. 391, 430 n.40, 83 S.Ct. 822, 9 L.Ed.2d 837, 863-864. The United States Supreme Court is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court, after the United States Supreme Court corrected the state court's views of federal laws, the United States Supreme Court review could amount to nothing more than an advisory opinion. *Id.*

VII. STATEMENT OF THE CASE

1. Introduction

It is true that Rickey Lee Bryant, together with four other people, was murdered on August 10, 1982, by Robison. It is also true that Robison purchased some .22 caliber rimfire ammunition from WINN-DIXIE on August 10, 1982; however, there is no evidence in the record to show whether or not this same ammunition was used in the murders. Likewise, it is also true that Robison had been convicted of a felony approximately five (5) years before the sale.

2. WINN-DIXIE Did Not Breach Any Duty Owed Under the Circumstances of this Case

BRYANTS have alleged that WINN-DIXIE violated the Federal Firearms Control Act, 18 U.S.C. § 922(d), by selling the .22 caliber rimfire ammunition to Robison, solely because of Robison's prior felony conviction. However, 18 U.S.C. § 922(d) only makes it unlawful to sell ammunition to a person *knowing or having reasonable cause to believe* that such person has been convicted of a crime punishable by imprisonment for a term exceeding one year.

The fact that Robison had been convicted of a felony approximately five (5) years before the sale, standing alone, presents no evidence to support the speculative assumption that WINN-DIXIE *knew or had reasonable cause to believe* that Robison was a convicted felon at the time of the ammunition sale. In fact, the only evidence on point before this Court negates any such knowledge or reasonable cause to believe. This evidence is discussed later in this Brief.

BRYANTS make much ado of an inference supposedly stemming from John Schwabauer, an employee of WINN-DIXIE in 1982, but retired at the time of giving his Affidavit and deposition, who sold the ammunition to Robison, not specifying in a deposition (after being asked for "kind of a summary of what those verbal instructions consisted of") that he knew, or was formally instructed, that a felony conviction disqualified a person from purchasing ammunition under the Federal Firearms Control Act. [TR. pp. 163-166]. However, the only evidence in the record before this Court, directly on point, is contained in the Affidavit of John Schwabauer, wherein he stated:

> I knew, and all other employees in Store No. 9410 who sold ammunition knew, that we were not to sell ammunition to any person that we had any reason to believe had been indicted or convicted of a crime or who was an unlawful user of drugs or who displayed some type of mental problem, or that gave the appearance of being intoxicated by any substance. Generally, employees were briefed on these procedures at the time they were hired. All employees working at Store No. 9410 in August of 1982 were aware of these procedures for ammunition sales and followed these procedures. [TR. p. 49].

BRYANTS have never articulated in the Courts below, nor do they now, what "duty" they claim WINN-DIXIE had that was supposedly breached, or how this amorphous, undefined "duty" was breached. The closest BRYANTS have come to describing this "duty" is to state that WINN-DIXIE had a

"duty" to cooperate in the enforcement of the Federal Firearms Control Act to a greater extent than is indicated by the deposition testimony of John Schwabauer, the former employee of WINN-DIXIE, who sold the ammunition to Robison. [TR. pp. 145-150].

Apparently, BRYANTS are attempting to argue that WINN-DIXIE had a "duty," stemming indirectly from 18 U.S.C. § 922(d), to provide some type of formal training, above and beyond the briefing procedures described by Mr. Schwabauer in his Affidavit and deposition, as to how to spot a person who has been convicted of a felony. Alternatively, BRYANTS seem to be arguing that WINN-DIXIE had a "duty" under 18 U.S.C. § 922(d) to investigate and determine that Robison had a past criminal record, regardless that no special circumstances or dangers were presented at the time of the ammunition sale.

BRYANTS argue that WINN-DIXIE should have made inquiry into the past criminal record of Robison as such information was "readily available" by a simple telephone call to the Tarrant County Criminal District Clerk's office, which would have taken "less than one minute." [TR. p. 2]. The evidence in the record and the law on point shows this argument is untenable.

The Affidavit of Joyce Reddy, Supervisor of the Firearms and Licensing Section, Compliance Operations, Bureau of Alcohol, Tobacco and Firearms, shows that, as of January 1, 1983, there were 531 licensed firearms dealers in Tarrant County, Texas, authorized to sell ammunition. [TR. p. 65]. E. P. "Winn" Heinrich, Controller of WINN-DIXIE and custodian of ammunition sales records for various stores, testified that there were approximately 21 ammunition sales made, per month, at WINN-DIXIE stores in 1982. [TR. pp. 66-96].

If every one of the 531 licensed dealers had to call the Tarrant County Criminal District Clerk's office regarding a comparable number of ammunition sales transactions, resulting in

approximately 372 calls per day, the Criminal District Clerk's office simply could not have handled the inquiries.

Stella Davis, the Chief Criminal District Clerk for Tarrant County, Texas, testified that "it would not have been feasible in 1982 . . . to handle even (a) 100 such additional calls per day." [TR. p. 46]. Stella Davis further testified that, in 1982, an employee would have had to respond to such a call by manually looking through the books, as only pending cases were stored on a computer. Therefore, each such call inquiring about a potential criminal record could take a great deal of time, dependent on how many years back the employees of the Criminal District Clerk's office were required to search. [TR. p. 46].

Moreover, BRYANTS suggest no limits to this supposed "duty" of investigation and inquiry. To how many County Criminal District Clerk's offices would BRYANTS require such contacts be made? How many various state and federal offices would these inquiries encompass? How would one inquire on courthouse holidays, weekends or after hours?

3. BRYANTS Have Misstated the Holdings of the Courts Below

BRYANTS state that the trial court found, as a matter of law, no duty to inquire of disqualifying factors under 18 U.S.C. § 922(d), regardless of the circumstances surrounding an ammunition sale. BRYANTS further indicate that this is the holding of the Court of Appeals and of the Supreme Court of Texas. These representations are not accurate.

Rather, the Courts below held that, in the particular circumstances surrounding the sale of the .22 caliber rimfire ammunition to Robison, there was, as a matter of law, no duty of further inquiry, above and beyond the requirements set forth by applicable statutes, codes, regulations and case law, because there were no special manifest circumstances or dangers which might have put WINN-DIXIE on notice, or given WINN-DIXIE reasonable cause to believe, that Robison was

a convicted felon, or that there was any other reason why Robison should not have been sold the ammunition. As stated in the Opinion of the Court of Appeals:

> However, a fair reading of this statute does not indicate that it gives rise to strict liability. *See*, 18 U.S.C.A. § 921 *et seq.* A violation under this statute requires the seller to know or have reasonable cause to believe that the person to whom he is about to sell a firearm or ammunition fits into one of the four categories specifically set out by the Act. It is here that this court and appellants disagree. There is nothing in this statute which indicates a duty of inquiry on the part of the seller. *See*, 18 U.S.C.A. § 921 *et seq.* The only evidence presented to the trial court at the summary judgment hearing with regard to what appellees' employee knew or had reasonable cause to believe came from the Affidavit of the clerk who sold the ammunition and also this clerk's deposition testimony.
>
> The affidavit and deposition of the store clerk indicate that he recalls selling the ammunition to the assailant. He testified that the assailant did not appear unusual or remarkable in any way. We think it is reasonable that the trial court made no finding that the duty of ordinary care did not exist, rather they found there was no breach of the duty of ordinary care.
>
> * * *
>
> We hold, in view of the summary judgment evidence, taken in the light most favorable to appellants, it is unreasonable for appellants to suggest that the trial court held, as a matter of law, that no duty exists on the part of the seller of ammunition to use ordinary care. We think the record more reasonably indicates the court found a duty, and found that the duty had not been violated.

Bryant, et al. v. Winn-Dixie Stores, Inc., et al., 786 S.W.2d 547, 548-9 (Tex. App. – Fort Worth 1990, writ denied).

VIII. NO SPECIAL OR IMPORTANT REASON FOR GRANTING WRIT

1. BRYANTS Have Misstated the Holding of the Court of Appeals

BRYANTS allege two reasons for this Court to grant BRYANTS' Petition for Writ of Certiorari. First, BRYANTS represent that they "believe" that the holding of the Court of Appeals is contrary to the Congressional intent of the Federal Firearms Control Act. BRYANTS argue that the holding of the Court of Appeals would permit ammunition dealers to "look the other way," and that it promotes "willful blindness" in firearms transactions, allowing dealers to make absolutely no inquiry as to whether a potential purchaser might fall within one of the four categories set out in 18 U.S.C. § 922(d), regardless of the circumstances surrounding the sales transaction.

As mentioned above, BRYANTS have misstated the holdings of the Courts below. As assessed by the Court of Appeals, BRYANTS have sought, throughout these proceedings, and now seek, a ruling that, as a matter of law, any duty in connection with the sale of ammunition carries with it some type of automatic "duty" to investigate the potential past criminal record of a purchaser, even absent any special circumstances or dangers presented at the time of the ammunition sale. The Court of Appeals declined to make such a ruling. *Bryant*, 786 S.W.2d at 548.

The Court of Appeals held that a fair reading of 18 U.S.C. § 922(d) does not indicate that the statute gives rise to strict liability but that, rather, a violation would require a seller to *know or have reasonable cause to believe* that the person to whom he is about to sell ammunition fits into one of the four categories specifically set out in the statute. *Id.* The Court of

Appeals further held that, based on the evidence in the record, as a matter of law, WINN-DIXIE did not know or have reasonable cause to believe that Robison fell within one of the four categories set out in 18 U.S.C. § 922(d). *Id.* Thus, the true holding of the Court of Appeals was that WINN-DIXIE had no obligation to investigate Robison's potential past criminal history under the circumstances presented in this case.

2. WINN-DIXIE Complied With 18 U.S.C. § 922(d)

The Federal Firearms Control Act, 18 U.S.C. § 922(d), only makes it unlawful for a licensed dealer to sell ammunition to a person when the dealer *knows or has reasonable cause to believe* that such person has been convicted of a crime punishable by imprisonment for a term exceeding one year. The fact that Robison had been convicted of a felony approximately five years before WINN-DIXIE sold him the .22 caliber rimfire ammunition does not, in and of itself, show that WINN-DIXIE *knew or had reasonable cause to believe* that Robison was a convicted felon, or any other reason that Robison should not be sold the ammunition.

In fact, the only evidence on point in the record negates any such knowledge or reasonable cause to believe. It includes the Affidavit of John Schwabauer, at paragraph 3 on page 2, wherein Mr. Schwabauer states:

> To the best of my knowledge, I had never seen Larry Keith Robison before the time of the afore-mentioned purchase. I had no reason of any kind to know that he had been convicted of any type of crime or that he had any type of criminal record. [TR. p. 49].

Further, in Mr. Schwabauer's Affidavit, as well as in his deposition, he stated that there was nothing unusual about Robison's appearance or behavior at the time of the ammunition sale. [TR. pp. 49, 171; Schwabauer Depo., p. 21].

Likewise, Billy Sampson, the employee of Camp Bowie Pawn Shop, which sold a gun to Robison approximately one week before WINN-DIXIE sold ammunition to him, testified that, at the time of the sale of the gun, Robison filled out the form required for purchase of a firearm, Form 4473, certifying that he had never been convicted of a felony. Sampson also testified that there was no indication whatsoever that there was anything wrong with Robison, mentally or emotionally, or that he was intoxicated or under the influence of any narcotic or drug at the time of the purchase. [TR. pp. 235-7; Sampson Depo., pp. 13-15].

In fact, the very people who filed this Petition for Writ of Certiorari, and who had welcomed Robison into their home on several occasions, knowing that Robison was a close companion to their son, Rickey Lee Bryant, have admitted that Robison appeared normal and ordinary.

Donald Bryant, one of the Petitioners herein, testified that there was nothing suspicious or unusual about Robison, that Robison appeared clean shaven, an ordinarily-groomed man, that he had no qualms or reservations about letting Robison into his home, and that he was not, for any reason, afraid, scared, or concerned about Robison. [TR. p. 231; Donald Bryant Depo., p. 16].

Similarly, Junett Bryant, another one of the Petitioners herein, testified that Robison seemed to be just an average, ordinary person, who did not appear to have anything wrong with him, who gave no indication that he was a person that had any trouble with the law, who gave no indication that he was a drug user, who gave no indication that he might have a drinking problem and who did not appear to be mentally unstable or emotionally disturbed. [TR. pp. 228-9; Junett Bryant Depo., pp. 43-44].

3. WINN-DIXIE Complied With All Recording Requirements

In addition to the requirements set forth in 18 U.S.C. § 922(d), there were certain recording requirements effective

in August of 1982, the time of the ammunition sale, relating to ammunition sales. Until December of 1982, the U.S. Code stated that it was unlawful for any licensed dealer to sell ammunition to a person unless a record was kept of the purchaser's name, age and place of residence. 18 U.S.C. § 992(b)(5) (1976). This section of the U.S. Code was amended in December of 1982 and currently provides that if the ammunition to be purchased is .22 caliber rimfire ammunition, record keeping is unnecessary. 18 U.S.C. § 922(b)(5) (Supp. 1986).

Similarly, § 923(g) of the U.S. Code required all licensed dealers who sold ammunition to maintain such records as prescribed by the Treasury Secretary, prior to December of 1982. However, this section of the U.S. Code was amended in December of 1982, and now .22 caliber rimfire ammunition is excluded from the prescribed regulations. 18 U.S.C. § 923(g) (1976 and Supp. 1986).

The legislative history of these particular provisions reveals the rationale for amending the two (2) recordation sections of the U.S. Code. The Senate Committee reported that to insist on the recording of .22 caliber rimfire ammunition was an "enormous and unnecessary administrative burden on the Treasury Department, on firearm dealers, and on the nation's sportsmen who purchase this type of ammunition." Furthermore, the report states that these requirements do not increase public safety. S. REP. NO. 428, 91st Cong., 1st Sess., *reprinted in*, 1969 U.S. CODE CONG. & ADMIN. NEWS 1322, 1347.

The Code of Federal Regulations also explicitly provides for recordation of ammunition sales. The present Code provides an exception to the recording of sales for .22 caliber rimfire ammunition. 27 C.F.R. § 178.125(c) (1985). This differs from the regulations effective in August of 1982, which directed that sales of ammunition of .22 caliber rimfire ammunition be recorded. 27 C.F.R. § 178.125(c) (1982).

Thus, although under current statutes, codes and regulations, WINN-DIXIE would have no duty to record any information regarding the ammunition sale to Robison, they were required, in August of 1982, to record some basic information. This information included the purchaser's name, address, date of birth, date of transaction, name of the manufacturer, caliber or gauge, quantity of ammunition and the method used to establish the identity of the purchaser. 27 C.F.R. § 178.125(c) (1982).

The uncontroverted evidence in the record, including the Affidavit of John Schwabauer and Mr. Schwabauer's deposition, *conclusively establish that WINN-DIXIE wholly complied with the aforementioned applicable recording requirements.* Exhibit "1" attached to Mr. Schwabauer's deposition, the ammunition form, filled out at the time of the ammunition sale to Robison, shows that all pertinent information was recorded. [TR. p. 199; Schwabauer Depo., Exhibit 1]. Mr. Schwabauer testified that he recorded this information from a valid, unexpired Texas driver's license presented by Robison. [TR. pp. 176 and 199; Schwabauer Depo., p. 26 and Exhibit 1].

For purposes of clarification, it should be emphasized that the recording requirements for the sale of firearms differ from ammunition sales requirements. A dealer of firearms may not sell any firearm to a person unless he records the transaction on a Firearms Transaction Record, Form 4473. 27 C.F.R. § 178.124(a) (1982).

Form 4473 shows the name, address, date, place of birth, height, weight and race of the purchaser and includes an executed certification by the purchaser that he/she is not prohibited from receiving a firearm; i.e., that he/she is not a convicted felon, a fugitive from justice, a drug user, and has not been adjudicated a mental defective or committed to a mental institution. 27 C.F.R. § 178.124(c) (1982). There is no such requirement for a seller of ammunition.

4. No Duty Beyond Compliance With All Applicable Statutes, Regulations, and Codes Absent Special Circumstances

When a legislature has enacted regulations which define the standard of care to be exercised in a firearms transaction, compliance with the regulations normally absolves an individual or entity of any need to take additional precautions absent special circumstances or dangers. *Heatherton v. Sears, Roebuck & Company*, 593 F.2d 526 (3rd Cir. 1979), *aff'd*, 652 F.2d 1152 (3rd Cir. 1981), *citing*, Prosser, *Handbook on the Law of Torts*, § 36 (4th ed. 1976). In *Heatherton*, the firearms purchaser had a prior felony conviction but this, in and of itself, was not sufficient to impose some higher investigative "duty."

In *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841 (Tex. App. – San Antonio 1989, writ denied), also a summary judgment proceeding, the appellate court entertained the suggestion of a common law negligence action brought by the heirs of a person who was shot and killed against the seller of the handgun used in the shooting. As a threshold inquiry, the appellate court considered whether there was the existence and violation of any duty owed to the heirs, such to establish liability in tort. *Peek*, 768 S.W.2d at 846. Noting that duty is the function of several interrelated factors, the foremost consideration being foreseeability of the risk, the appellate court emphasized that:

> "One is not bound to anticipate negligent or unlawful conduct on the part of another." (cites omitted).

Id.

In *Peek* the purchaser of the handgun had past mental problems and there was summary judgment evidence in the record that, at the time of the sale, the purchaser appeared to be nervous, uptight and in a hurry. The appellate court held that, under the circumstances of the case, there was, as a matter of law, no reason for the firearms seller to anticipate an insane or criminal act of violence on the part of the purchaser and, therefore, the seller did not breach any duty of reasonable

care. *Peek*, 768 S.W.2d at 847. The appellate court stated that only if a prospective purchaser's manifest behavior or comportment were such that the ordinary observer would be put on notice that the purchaser, if possessed of a firearm, should foreseeably pose a danger to third persons, might liability be supportable. *Id.*

Further, BRYANTS' reliance on this Court's opinion in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974) is misplaced. The Legislative history quoted by BRYANTS from *Huddleston* does not, in any way, suggest the creation of any type of "duty" above and beyond compliance with applicable statutes, codes and laws, absent special circumstances or dangers surrounding a transaction. Specifically, *Huddleston* dealt with the question of whether the "acquisition" of a firearm included pawn shop redemptions, such that a firearm purchaser who knowingly made a false statement in connection with the "acquisition" of a firearm, intended or likely to deceive the seller as to any fact material to the legality of the sale, could be convicted. Thus, *Huddleston* is not relevant to the case at bar.

5. Holding of the Court of Appeals Is Not In Conflict With Any Other Decision

Second, BRYANTS allege that the holding of the Court of Appeals is in conflict with the decisions of "virtually every state court of last resort that has considered the matter" and with the decisions of the United States Courts of Appeals. This, too, is incorrect.

One such opinion supposedly in conflict is *Heatherton*, 593 F.2d 526. In *Heatherton*, as in the case at bar, the purchaser had a prior felony conviction. However, the fact of a prior felony conviction, in and of itself, did not create the special circumstances which would be necessary to impose some type of higher duty to do more than comply with the applicable statutes, codes and regulations.

BRYANTS further cite this Court to the case of *Phillips v. Roy*, 431 So.2d 849 (La.App.–2nd Cir. 1983). In fact, the *Phillips* case sets forth the type of evidence which BRYANTS should have submitted, had it been available, to oppose WINN-DIXIE's Motion and Amended Motions for Summary Judgment.

In *Phillips*, it was alleged that the store employee who sold a .357 Magnum pistol, either *knew or should have known* that the purchaser was mentally incompetent. *Phillips*, 431 So.2d at 851. The appellate court held that a material fact as to the purchaser's demeanor and conduct when he purchased the pistol existed, such that the salesperson should have been alerted to his mental incompetence, in view of certain deposition testimony offered in connection with the response to the motion for summary judgment. *Phillips*, 431 So.2d at 852. This deposition testimony included testimony from the purchaser's minor daughter and mother, stating that the purchaser appeared (by physical demeanor and conduct) to be mentally disturbed when he left his home on the morning of the purchase and subsequent shooting incident. *Id.*

The daughter stated that her father was yelling and cursing, and insisted that her little puppy be killed simply because the puppy was black, and that the child attempted to contact a friend on the police force to look for her father later that morning. The girl testified that she believed that anyone who observed her father on the morning of the homicide would have concluded there was something wrong with him. *Id.*

The purchaser's mother gave a history of her son's persistent bouts with mental illness over the past years and testified that her son's institutionalization in a state hospital on five (5) separate occasions was information widely known by people in the area and, specifically, that the owner of the store which sold the firearm to her son was aware of it. Further, the mother testified that on the morning of the incident, just a couple of hours before her son purchased the weapon, her son's mind was obviously drifting. Her concern was so intense

that she telephoned a local judge to request confinement of her son in jail pending another commitment to the state hospital. *Id.*

If there were, in fact, any indication of special circumstances or dangers which might have given WINN-DIXIE reasonable cause to believe that Robison was a convicted felon, or that there was some other reason why he should not have been sold the ammunition, BRYANTS should have submitted summary judgment evidence to show those circumstances and thereby rebut the summary judgment proof of WINN-DIXIE. However, they did not.

The case of *Love v. Zales Corp., Inc.*, 689 S.W.2d 282 (Tex. App. – Eastland 1985, writ ref'd n.r.e.) is clearly distinguishable from the case at bar. In *Love*, the purchase was of a Winchester shotgun, not .22 caliber rimfire ammunition. As aforementioned, different recording requirements apply in the case of a firearm sale as opposed to an ammunition sale. Moreover, in *Love*, the purchaser filled out the Firearms Transaction Record, Form 4473, required for firearm sales, stating that he had been committed to a mental institution. Nonetheless, the salesclerk sold the firearm anyway, despite *knowing* that the purchaser had been committed to a mental institution.

In *Cullum & Boren-McCain Mall v. Peacock*, 592 S.W.2d 442 (Ark. 1980), the Supreme Court of Arkansas was dealing with the question of whether the trial court should have granted a directed verdict, i.e., whether there was no evidence regarding negligence in the case. The Court held that the case should be reversed and remanded for a new trial because whether the store was negligent in selling a .38 pistol was a question for the jury since there was evidence submitted at trial that the purchaser had requested a weapon which would "blow a big hole in a man." Additionally, evidence was submitted at trial that the seller's employees were suspicious of the purchaser throughout the sales transaction. The evidence showed that one employee had asked another to check the purchaser out by observation and by conversations with

the purchaser. Thus, in *Peacock*, as in the *Phillips* case, evidence was admitted showing that there were special circumstances or dangers surrounding the sales transaction.

In *Franco v. Bunyard*, 547 S.W.2d 91 (Ark. 1977), again, the case dealt with a firearm, not ammunition sales transaction, in which the seller was not even in token compliance with the law. The evidence showed that, despite having no identification and no money, after writing a hot check, the purchaser was allowed to leave the store with a pistol without even signing the required Form 4473. *Franco*, 547 S.W.2d at 93. According to the salesclerk, the Form 4473 was not filled out until the following day, after the sales transaction and after it was learned that the store had been duped. *Id.*

In *K-Mart Enterprises of Florida, Inc. v. Keller*, 439 So.2d 283 (Fla.App.–3rd Dist. 1983), also dealing with a firearm and not an ammunition sales transaction, the retail clerk, once again, failed to get the information from the purchaser to fill out the required Firearms Transaction Record, Form 4473. The seller did not even try to dispute that it was negligent *per se* in its sale of the .30-.30 rifle. Moreover, there was evidence admitted that if the purchaser had been asked, he would have truthfully responded that he was the subject of a felony information and was a user of marijuana.

As has been previously described, the recording requirements regarding firearms transactions are different from those for ammunition sales. The seller of a firearm is and was, in August of 1982, required to ask the purchaser whether or not they have been convicted of a felony, whether they are a drug user . . . and to get the purchaser to certify, in writing, that they have not been so convicted, do not use drugs . . . . There is, and was, no such requirement for an ammunition sale.

In the case at bar, Robison had earlier filled out the form required for a purchase of a firearm, Form 4473, certifying that he had never been convicted of a felony. [TR. pp. 235-7]. Thus, there is evidence in the record that Robison was asked

for this information at the time of the sale of a firearm, about one week before the sale of the ammunition by WINN-DIXIE, but lied. It is incredible to suppose that had Robison been asked the same information approximately one week later, at the time of the ammunition sale by WINN-DIXIE, he would have told the truth about his prior felony conviction.

BRYANTS also cite this Court to the case of *Decker v. Gibson Products Company of Albany, Inc.*, 679 F.2d 212 (11th Cir. 1982). Again, *Decker* deals with a firearm transaction in which the evidence showed that before buying a .38 caliber pistol, the purchaser informed the salesperson that the purchaser had been convicted of the felony of aggravated assault. It was uncontroverted that the sale of the handgun actually did violate 18 U.S.C. § 922(d), as the purchaser was *known* to be a convicted felon at the time of the firearm sale.

Next, BRYANTS cite *Howard Brothers of Phenix City, Inc. v. Penley*, 492 So.2d 965 (Miss. 1986) as an opinion supposedly in conflict with the opinion of the Court of Appeals in this case. Again, this representation by BRYANTS is inaccurate, as *Howard Brothers* is easily distinguishable from the case at bar. In *Howard Brothers* a department store was sued by a 70 year old man who was taken hostage in the department store, by a mentally deranged person, who was voluntarily handed a .357 caliber Magnum pistol, concurrently with the bullets for it, by the store's clerk. The assailant then loaded the revolver inside the store and, subsequently, took his hostage. The assailant had been in a mental institution in Louisiana and had been a patient in the Mississippi State Hospital on two (2) occasions. *Howard Brothers*, 492 So.2d at 966.

Additionally, the assailant had spent the previous night with a friend drinking, and taking "black mollies" and Valium. The assailant testified that, on the morning of the incident in question, he and his friend awoke around 7:00 o'clock, and he drank several drinks of whiskey and took about three (3) each of "black mollies" and Valium. The assailant testified that he was high at the time of the incident. *Id.*

Moreover, the evidence showed that the salesclerk made no attempt to comply with state and federal statutes. The salesclerk delivered a pistol to the assailant, who was a minor, without any attempt to ascertain his age, as well as to a mental cripple, who was high on alcohol and drugs at the time. *Howard Brothers*, 492 So.2d at 968. The Court held that a dealer in firearms should have in effect in his business some safeguard to see that a loaded handgun is not placed in the hands of an unknown person, at the dealer's place of business, unless or until the person's background could be thoroughly investigated. *Howard Brothers*, 492 So.2d at 969.

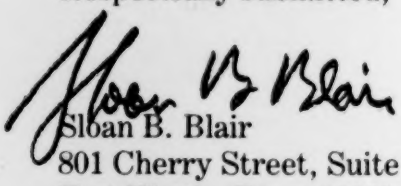
Lastly, BRYANTS cite this Court to several cases interpreting "knowing or having reasonable cause to believe" language, or similar language, found in statutes other than 18 U.S.C. § 922(d). None of these cases, cited by BRYANTS at pages 26 through 28 of their Petition for Writ of Certiorari, construe 18 U.S.C. § 922(d), the statute relevant in the case at bar.

Nonetheless, BRYANTS point out that similar language to the "knowing or having reasonable cause to believe" language, used in other statutes, has been construed to mean that one cannot intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate. (*See*, Petition for Writ of Certiorari, pp. 27-28 and cases cited therein.) This is exactly the point. The evidence of record in this case showed that there were no manifest special circumstances or facts which might have given WINN-DIXIE reasonable cause to believe, or might have prompted WINN-DIXIE to investigate.

IX. PRAYER

Wherefore, WINN-DIXIE prays that this Court deny BRYANTS' Petition for Writ of Certiorari and, alternatively, that this Court affirm the judgment of the Court of Appeals. WINN-DIXIE further prays that they recover their costs and for such other and further relief to which they may be entitled.

Respectfully submitted,



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[Signed 12-8-88]

APPENDIX A

IN THE DISTRICT COURT
TARRANT COUNTY, TEXAS
17TH JUDICIAL DISTRICT

No. 17-85335-84

DONALD BRYANT and Wife, JUNETT BRYANT,
Individually and as Next Friend of
DAWN DEE BRYANT, a Minor, and
KIRT BRYANT

vs.

HAROLD C. MILLER, d/b/a
CAMP BOWIE PAWN SHOP, and
BUDDY'S HANDYMAN CENTER,
WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
and WINN-DIXIE TEXAS, INC.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND AMENDED MOTIONS FOR SUMMARY JUDGMENT AND SEVERANCE OF DEFENDANTS WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. AND WINN-DIXIE TEXAS, INC.

Be it remembered that on the 2nd day of September, 1988, came on to be heard the Motions for Summary Judgment and Amended Motions for Summary Judgment of Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., in the above entitled and numbered cause; and it appearing to the Court that such Motions were duly made in proper form, time and manner, that legal notice thereof had been duly given to the

Plaintiffs for the requisite time period, and that Plaintiffs and Defendants submitted the matter to the Court for review; and it further appearing that such Motions of the Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., were based upon and directed to the pleadings, depositions, affidavits, certified documents and other discovery on file in the records of this cause; and the Court having taken same under advisement and having considered all the motions and pleadings, including, but not limited to, the Plaintiffs' Response to Motions for Summary Judgment and Amended Motions for Summary Judgment of Defendants WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., along with the affidavits and attachments thereto, the Court having overruled the Defendants' objections regarding late filing; the Plaintiffs' Letter Brief dated September 9, 1988; and Defendants WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC.'s Brief in Response to Plaintiffs' Letter Brief, and having reviewed the evidence and the argument of counsel, the Court is of the opinion and does find that the pleadings and the evidence show and reflect the absence of any genuine issue of material fact as regards any cause of action of Plaintiffs, DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT; and the Court does thereupon accordingly find that the Motions for Summary Judgment and the Amended Motions for Summary Judgment of said Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., should be granted upon each and every ground stated in such Motions.

It is therefore, ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment and Amended Motions for Summary Judgment of Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., are GRANTED upon each

and every ground stated in such Motions; and it further appearing to the Court upon Motion of the Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., that there exists a necessity for the severance of the causes of action stated against Defendants so that the causes of action against said Defendants shall become final; and it further appearing that good cause does exist for such severance;

It is accordingly ORDERED, ADJUDGED and DECREED that the causes of action of Plaintiffs, DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT, as stated against Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., shall be and the same are hereby severed of and from this Cause No. 17-85335-84, which will remain pending as against Defendant HAROLD C. MILLER d/b/a CAMP BOWIE PAWN SHOP, and the Plaintiffs' causes of action against Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC. shall be redocketed as Cause No. 17-117421-88, to be styled DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT vs. WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., so that this Order shall constitute a Final Judgment of Plaintiffs' causes of action against Defendants, WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., shall be charged to said Defendants and the cost of Court incurred herein by Defendants shall be charged against Plaintiffs, DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT, in the redocketed Cause No. 17-117421-88, styled DONALD BRYANT and wife, JUNETT BRYANT, Individually and as Next Friend of DAWN DEE BRYANT, a Minor, and KIRT BRYANT vs.

WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC. and WINN-DIXIE TEXAS, INC., for which execution may issue if not paid in due course.

SIGNED this 8th day of December 1988.

/s/ _____
JUDGE PRESIDING

APPROVED AS TO FORM:

_____
ART BRENDER

Attorney for Plaintiffs,
Donald Bryant and wife,
Junett Bryant, Individually
and as Next Friend of Dawn
Dee Bryant, a Minor,
and Kirt Bryant

CANTEY & HANGER

By: _____
TOLBERT L.
GREENWOOD

Attorney for Defendants
Winn-Dixie Stores, Inc.,
Winn-Dixie Handyman, Inc.
and Winn-Dixie Texas, Inc.

(3)

No. 90-1089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT AND WIFE, JUNETT BRYANT, INDIVIDUALLY AND AS NEXT FRIENDS OF DAWN D. BRYANT AND KIRT BRYANT,
Petitioners

v.

WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC., AND WINN-DIXIE, INC.,
Respondents

Petition for Writ of Certiorari to the Court of Appeals of Texas, Second Court of Appeals District, Fort Worth, Texas

Petitioners' Response to Respondents' Brief in Opposition to Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in *Bryant, et al. v. Winn-Dixie Stores, Inc., et al.*, that the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d), does not require a seller of ammunition to inquire about disqualifying grounds for the sale of ammunition under the statute conflict with the intent of Congress and with the interpretation of this statute by this Court in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)?

2. Does the retail sale of ammunition require a licensed seller to inquire about the prior criminal record (or other disqualifying grounds) of the purchaser in order to comply with the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d), prohibition against the sale of ammunition to those who are disqualified by the statute?

LIST OF PARTIES

The parties to the proceeding below are the petitioners, Donald and Junett Bryant and their two children, Dawn D. Bryant and Kirt Bryant.

The respondents are Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc., and Winn-Dixie, Inc.

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No. 90-1089

IN THE

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Respondents

Petition for Writ of Certiorari
to the Court of Appeals of Texas,
Second Court of Appeals District,
Fort Worth, Texas

Petitioners' Response to Respondents' Brief in Opposition to Petition for Writ of Certiorari

The Petitioners file this their response to the Respondents' Brief in Opposition to Petition for Writ of Certiorari and would show the Court that certain of the sections of Respondents' Brief deserve comment or explanation because the matters raised were new and not covered in the Petition for Certiorari. These sections

are noted by the titles given them in the Respondents' Brief.

"VI. OBJECTIONS TO JURISDICTION"

"1. No Ground Under 28 U.S.C. § 1257(a)"
"2. BRYANTS Seek an Advisory Opinion"

The Respondents claim in this section as well as in others, that the Court of Appeals in *Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547 (Tex. App. – Fort Worth, 1990, writ denied) upheld another ground of their Motion for Summary Judgment which would "necessitate the judgment in favor of Winn-Dixie still stand." (Brief in Opposition to Petition for Writ of Certiorari, p. 3). Nothing is further from the truth. As can be seen from the Court's opinion, attached as Appendix A to Petitioners' Writ of Certiorari, the Court of Appeals ruled only on the breach of duty question. (Petitioners' Petition for Certiorari Appendix A-15). Any reversal by the Court would remand the matter back to the Court of Appeals to determine the validity of that point. Thus, there is no advisory opinion being requested by the Petitioners since the Texas Court of Appeals, with writ denied by the Texas Supreme Court, clearly held, as the Petitioners' have claimed, that there is no duty to ask and inquire about nonqualifying factors under the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d). The decision of the Court of Appeals is final and because it was final on the points at issue here, there was no need to review other points. That does not mean that a reversal of the Court of Appeals decision would mean affirmance on any

other ground. The appeal placed in issue the entire judgment of the District Court and that judgment remains in abeyance until the appeal is decided. That would in no way affect this Court's jurisdiction to decide the federal issues raised by the Petition for Certiorari. For purposes of information, however, Texas courts, along with the majority of courts that have decided the issue have adopted Restatement 2d of Torts § 448 which states as follows:

> The act of a third person in committing an intentional tort or crime is a superceding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

The Texas Supreme Court, in *Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex. 1985), adopted § 448 of the Restatement 2d of Torts. It is clear now that a tort feasor's negligence will not be excused where criminal conduct is a foreseeable result of such negligence and that rule is uniformly followed. Since this matter was decided on a motion for summary judgment, the entire facts of the action have not been brought forth even in the district court. The question of proximate cause is generally a question of fact to be determined by the fact finder. *Nixon v. Mr. Property Management*, *supra*. Furthermore, Winn-Dixie provided no summary judgment proof whatsoever on the issue of proximate cause in its

Motion for Summary Judgment and relied only on the legal argument that, as a matter of law, the criminal act was a superceding cause. This argument has been rejected by the Texas courts who require proof on behalf of a defendant on this point and thus, any remand of this matter to the Court of Appeals will undoubtedly result in the proximate cause point of error being reversed and remanded to the District Court. *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. App. – Beaumont 1989).

The Bryants seek review of this decision under 28 U.S.C. § 1257 based on the conflict between the decisions of the highest state court of the State of Texas and that of the Supreme Court on matters of federal law and in particular, the interpretation of the act at issue by this Court in *Huddleston v. United States*, 415 U.S. 814 (1974). *See Hudson v. Louisiana*, 450 U.S. 40 (1981), *William E. Arnold Co. v. Carpenters District Counsel*, 417 U.S. 12 (1974), *Pittsburgh v. Alcoa Parking Corporation*, 417 U.S. 369 (1974). Likewise, a conflict between decisions of the highest courts of two or more states on a federal question is also a valid ground for Supreme Court review particularly where the conflict occurs in connection with the construction of a federal statute. *Saint Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), *United States v. Oregon*, 366 U.S. 643 (1961), *Citizens and Southern National Bank v. Bougas*, 434 U.S. 35 (1977), *Dun and Brad Street Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Despite the absence of a conflict, state court decisions involving the construction and application of federal statutes may be reviewed on certiorari where the question is sufficiently important. *Colovrat v. Oregon*, 366 U.S. 187 (1961). *See* Stern,

Gressman, and Shapiro, *Supreme Court Practice*, 6th ed. Given the proliferation of weapons, skyrocketing crime rates and the effect of weapons in the hands of those who are disqualified, the question raised by the Texas Court of Appeals decision is sufficiently important to merit Supreme Court review of this interpretation of the Federal Gun Control Statute, 18 U.S.C. § 922(d).

"VII. Statement of the Case"
"VIII. No Special or Important Reason for Granting Writ"

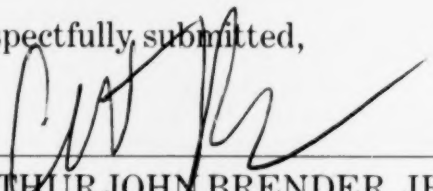
The Respondents' attempt in these sections to extend the "duty" to which they claim they complied to a ridiculous extent. The minimal duty which the Federal Firearms Control Act requires of the seller of a gun or ammunition is to inquire of the reasons that disqualify one from the purchase under the Act. In this case, the Court of Appeals held that there was no such inquiry necessary. The Respondents cite an affidavit of the seller of the ammunition, John Schwabauer, that conflicts diametrically with his testimony given in his deposition, portions of which are quoted in the Petition for Certiorari. Mr. Schwabauer gave his deposition on August 10, 1988, in the 17th District Court in Fort Worth, Tarrant County, Texas. After stating that he had no knowledge of any requirement save and except that the purchaser of ammunition had to be over eighteen years of age, his affidavit attached to the Respondents' Motion for Summary Judgment claims the contrary. Disregarding questions of the propriety of the glaring conflict between his deposition and his affidavit, under Texas summary judgment procedure, all inferences of conflicts in the evidence are

resolved in favor or the non-movant. *Rodriquez v. Naylor Industries, Inc.*, 763 S.W.2d 411 (Tex. 1989). The Court in Bryant so held. *Bryant v. Winn-Dixie*, 786 at 548. Other evidence in the record refutes the testimony Respondents cite about the ease with which information about criminal records can be obtained. This is not to argue that the Bryants are asking that there be a record check of everyone purchasing a gun or ammunition. The Bryants have maintained throughout that Mr. Schwabauer should have been informed of the requirements of 28 U.S.C. § 922(d) by his employer Winn-Dixie and should have asked the killer those questions. He then should have made a judgment based on the information he elicited as to whether or not he should have sold the ammunition. The Court of Appeals directly held that he was not required to do so, a contention the Petitioners believe is at odds with this Court's interpretation of the Federal Firearms Control Act (Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d) and this Court's decision in *Huddleston v. United States*, *supra* and the other interpretations of that statute as rendered by various state courts and federal courts of appeal as set out in the Petition for Certiorari. It is that issue for which the Petitioners seek review.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Court grant their Petition for Certiorari.

Respectfully submitted,



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Counsel for Petitioners

No. 90-1089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT AND WIFE, JUNETT BRYANT, INDIVIDUALLY AND AS NEXT FRIENDS OF DAWN D. BRYANT AND KIRT BRYANT,
Petitioners

v.

WINN-DIXIE STORES, INC., WINN-DIXIE HANDYMAN, INC., AND WINN-DIXIE, INC.,
Respondents

Certificate of Service

I hereby certify that on this the 19th day of February, 1991, one copy of the Petitioners' Response to Respondents' Brief in Opposition to Petition for Writ of Certiorari, was deposited in the United States mail, first class, postage prepaid, to the following:

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I further certify that all parties required to be served have been served.

Respectfully submitted,

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